IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AMBER LEIGH SMITH,	No. 32928-0-II UNPUBLISHED OPINION

ARMSTRONG, J. -- Amber Leigh Smith appeals her conviction for unlawful possession of a controlled substance with intent to deliver and unlawful possession of a firearm. She argues that her counsel was ineffective in failing to excuse two prospective jurors who worked in law enforcement, failing to object to certain testimony from a police officer, failing to elicit certain evidence in cross-examination, bringing out harmful evidence in other cross-examination, and failing to interview a witness. In addition, she argues that cumulative error requires a new trial. Finding no prejudicial error, we affirm.

FACTS

One day in August 2004, a neighbor saw Amber Leigh Smith arguing with her ex-girlfriend, Windy Ware. A few minutes later, the neighbor saw Smith point a gun at a car backing out of the alley. The neighbor called 911 and Tacoma Police Department dispatched Officers Michael Lim and Reginald Gutierrez to the scene.

When the officers arrived, they saw Smith walking toward her car carrying a backpack. Smith put the backpack down and walked to the driver's side of her car. After the officers identified themselves, Smith gave her name and birth date but explained that she had no

identification documents.

Smith denied that the backpack belonged to her, but agreed to allow the officers to search it. Inside the backpack Gutierrez found several plastic bags containing methamphetamine and crystal methamphetamine, a loaded black handgun with various types of ammunition, empty ziplock bags, a scale, jewelry, and a wallet with Smith's Washington State identification card, social security card, and a one-dollar bill. The officers arrested Smith and advised her of her *Miranda*[1] rights.

Smith told the officers that she knew nothing about the contents of the backpack, which belonged to Windy Ware. She explained that Ware had left it with her about 30 minutes before the officers arrived. The parties later stipulated that no fingerprints were found on the methamphetamine packaging and the handgun.

The State charged Smith with unlawful possession of a controlled substance with intent to deliver (Count 1), and unlawful possession of a firearm in the second degree (Count 2). Count 1 included a firearm sentencing enhancement.

During jury selection, the court asked the prospective jurors if any of them were personally involved in law enforcement. Jurors 12 and 14 said they were. Juror 12 was a Pierce County deputy sheriff, and juror 14 was employed by a program that works with police and citizens to combat street crime. When asked what kind of evidence he would collect in a case of unlawful possession with intent, juror 12 responded, "[A] controlled substance, that's a good thing to collect, and then something that proves this person knew it was there and they had it in their possession." Report of Proceedings (RP) at 63. Juror 12 also said that he had been accused

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

of something when he was innocent and agreed that an arrest does not necessarily mean that a person is guilty beyond a reasonable doubt. Juror 14 admitted having "more than one" negative experience with law enforcement, and said the war on drugs is not working because "we rely too much on enforcement and not enough on treatment." RP at 59, 64. When directly questioned about potential professional bias, both jurors stated that they would make an objective decision based on the evidence. Neither party excused jurors 12 and 14 on peremptory challenges.

At trial, Officer Gutierrez testified that, based on his training and experience investigating narcotics cases, "[m]ost narcotics dealers have a separate stash of narcotics for themselves that's more than likely more pure than the narcotics they're selling." RP at 119. He identified the ziplock bags and scale found in the backpack as items relating to the sale of narcotics, and testified that the backpack contained hollow-point ammunition, which "enters whatever it hits, [causing] more damage to the interior of the body." RP at 131-32. When questioned about the handgun and ammunition, Gutierrez stated that "[p]eople that usually sell narcotics usually carry a weapon for protection against people that may want to steal from them narcotics and/or money." RP at 132.

During cross-examination of Officer Lim, defense counsel brought out that Smith had told the officers she did not know what was in the backpack. Defense counsel then asked Lim, "[Y]ou didn't believe her because her ID was in the bag, right?" RP at 160. Lim responded, "Yes, that and plus she was actually holding the bag." RP at 160.

The defense called Windy Ware who testified that neither the gun nor the backpack belonged to her. Defense counsel also elicited that neither Ware nor Smith could legally possess a weapon because both were convicted felons. The defense offered additional testimony from Verna de La Garza, Smith, and Wendy Matlock,

who all claimed that Ware had admitted to owning the gun.

The jury found Smith guilty of Counts 1 and 2 and found by special verdict that she was armed with a firearm when she committed Count 1.

ANALYSIS

I. Ineffective Assistance of Counsel

Both the United States Constitution, amendment VI, and Washington Constitution, article I, section 22, guarantee an accused the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). We review a claim of ineffective assistance of counsel de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

A defendant demonstrates deficient performance by showing that defense counsel's representation fell below an objective standard of reasonableness. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). We presume that counsel was effective and counsel's conduct that can be characterized as legitimate trial strategy or tactics will not support a claim of deficient performance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

A defendant demonstrates prejudice by showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Davis*, 152 Wn.2d at 672-73 (citing *McFarland*, 127

Wn.2d at 334-35). Reasonable probability is "'a probability sufficient to undermine confidence in the outcome.'" *Davis*, 152 Wn.2d at 673 (quoting *Strickland*, 466 U.S. at 694).

Smith claims that her counsel's representation was flawed because he (1) failed to exercise preemptory challenges against jurors 12 and 14; (2) failed to object to inadmissible testimony; (3) failed to effectively cross-examine witnesses; (4) solicited inadmissible opinion testimony from Officer Lim regarding Smith's credibility; (5) failed to interview a defense witness pretrial; (6) solicited from a defense witness that she was a convicted felon; and (7) failed to call the police officers who took the defendant's burglary report two days before the charged crime. We find none of Smith's claims persuasive.

1. Use of Preemptory Challenges During Voir Dire

Smith contends that her counsel should have excused jurors 12 and 14 because of their likely law enforcement biases.

Juror 12 was a deputy sheriff in Pierce County, and had worked in the narcotics unit. When counsel asked what kind of evidence he would collect in a case of unlawful possession with intent, juror 12 responded, "[A] controlled substance, that's a good thing to collect, and then something that proves this person knew it was there and they had it in their possession." RP at 63. Juror 14 was employed by a program that works with police and citizens to combat street crime.

But other than their employment, nothing in the answers of either juror suggests actual bias. When directly questioned about potential professional bias, both jurors stated that they would make an objective decision based on the evidence. Juror 12 said that he had been accused of something when he was innocent (which "didn't feel very good") and agreed that an officer's arrest does not necessarily mean that a person is

guilty beyond a reasonable doubt. RP at 67-69. Juror 14 admitted having "more than one" negative experience with law enforcement, said that the war on drugs is not working because "we rely too much on enforcement and not enough on treatment," and said she recognized the Second Amendment right to bear arms. RP at 59, 64, 78.

We "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing *Strickland*, 466 U.S. at 689). Moreover, a prospective juror's attitude toward a case is difficult to glean from a cold record. Much of the decision about whether to excuse a juror may turn upon how the juror responds to counsel's questioning. The juror's body language, eye contact, and tone of voice may be more important than the words of his answer. And we are unwilling to hold as a matter of law that failure to excuse a prospective juror based on occupation alone constitutes deficient representation.

2. Objection to Admissibility of Testimony

Smith maintains that counsel should have objected to (1) Officer Gutierrez's testimony that "[m]ost narcotics dealers have a separate stash of narcotics for themselves that's more than likely more pure than the narcotics they're selling," (2) his description of the gun's ammunition, and (3) his testimony that drug dealers "usually carry a weapon for protection." RP at 119, 131-32; Br. of Appellant at 26-27; 29-30.

Counsel's choice of whether to object is a classic example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will we fault counsel for his choice. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. 668). To demonstrate that her counsel's decision fell below the acceptable standard, Smith must show (1) an absence of a legitimate

tactical reason for failing to object; (2) that the objection would likely have been sustained if raised; and (3) that the trial result would have been different if counsel had objected. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *McFarland*, 127 Wn.2d at 336-37); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

First, Smith does not persuade us that the court would have sustained a relevancy objection to Gutierrez's "separate stash" testimony. Evidence is relevant under ER 401 if (1) it has a tendency to prove or disprove a fact, and (2) that fact is of consequence to an issue in the case. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 K. Tegland, Wash. Prac. § 82, at 168 (2d ed. 1982)). The Washington State Patrol crime laboratory report states that one ziplock bag contained white powder methamphetamine, and another bag contained off-white crystal methamphetamine.[2] Gutierrez's testimony was relevant to prove that Smith possessed methamphetamine of varying degrees of purity and this tended to show that she was dealing in narcotics—an element of the State's case.

Smith next argues that her attorney should have objected to Officer Gutierrez's testimony that the gun found in the backpack had hollow-point ammunition, which "enters whatever it hits, [causing] more damage to the interior of the body." RP at 131-32; Br. of Appellant at 29-30. According to Smith, this testimony was irrelevant, and was "offered for the sole purpose of inflaming the jury against the defendant." Br. of Appellant at 30. However, the context of the record demonstrates the relevancy of Gutierrez's testimony, and also shows that there likely was no prejudice.

[2] Crystal is a more pure, more potent and more addictive form of methamphetamine, made by refining powder methamphetamine. Tim Wyatt, 'Ice' is Hot in Region; Smokable Form of Meth Growing as a Club Drug in Suburbs, Officials Say, Dallas Morning News, Nov. 8, 2003, at 1B.

Although relevant, evidence may be excluded under ER 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *Rice*, 48 Wn. App. at 13. While almost all evidence is prejudicial to some extent, "unfair prejudice" results from evidence likely to arouse an emotional response rather than a rational decision among jurors. *Rice*, 48 Wn. App. at 13. Here, a description of the ammunition was relevant to show that it was of the type used by drug dealers for "protection against people that may want to steal from them narcotics and/or money." RP at 132. And we question whether the testimony unfairly prejudiced Smith. Smith contended that neither the bag nor its contents were hers. Her defense did not rely on whether there was intent to deliver the methamphetamines. The type of ammunition in the bag did not tend to prove that Smith possessed the methamphetamine but that whoever possessed it did so with the intent of delivering it. Thus, because of her defense, the type of ammunition evidence did not unfairly prejudice Smith.

In addition, Smith cannot show that the trial outcome would likely have been different if counsel had successfully objected to the ammunition testimony. The backpack's contents, even without a description of the type of ammunition, were persuasive that whoever possessed the methamphetamine did so with the intent of dealing it.

Smith also faults her counsel for failing to object to Officer Gutierrez's testimony that "people that usually sell narcotics usually carry a weapon for protection against people that may want to steal from them narcotics and/or money." RP at 132; Br. of Appellant at 27. Relying on *United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988), Smith states that Gutierrez's testimony was nothing more than "inadmissible profiling evidence." Br. of Appellant at 27. However, Smith's reliance upon *Gillespie* is misplaced. The profiling evidence addressed in *Gillespie* involved the defendant's *character traits*. *See*

Gillespie, 852 F.2d at 480 (testimony addressed characteristics of a child molester, including early disruption in the family environment, a poor self concept, and general instability in the background). Gutierrez's testimony focused on the general *practices* of drug dealers, rather than character trait evidence. While the admission of character evidence is restricted, police officers may testify as experts regarding the significance of drug evidence based on their training, experience, and observations at the scene. *See State v. Sanders*, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992). Defense counsel's decision to not object to Gutierrez's testimony did not constitute deficient performance since the court would likely have overruled such an objection.

3. Cross-Examination of Witnesses

Smith contends that her counsel should have cross-examined the officers about (1) whether the ziplock bags and scale found in the backpack had other non-drug-related purposes, and (2) whether they were aware of a prior burglary reported by Smith in which her wallet was allegedly stolen.

A decision not to cross-examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal, or because counsel may conclude that cross-examination would not provide evidence useful to the defense. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001) (citing *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 404, 972 P.2d 1250 (1999)). Generally, the attorney is in a far better position to assess whether a witness will help or hurt the defendant's case than a reviewing court. *See State v. Robinson*, 79 Wn. App. 386, 396, 902 P.2d 652 (1995) (citing *State v. Piche*, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967)). If counsel's decision not to cross-examine a witness was conceivably a tactical one, it does not amount to ineffective assistance of counsel. *See Brown*,

143 Wn.2d at 451.

Smith has not shown that her counsel's performance was deficient during cross-examination. First, defense counsel *did* cross-examine Officer Gutierrez about the prior burglary. Second, counsel may have had several tactical reasons for not cross-examining Officer Gutierrez about his assertion that the ziplock bags and scale had a single purpose relating to drugs. Such cross-examination would have opened the door to damaging rebuttal, allowing the prosecution to reiterate that the probability of other uses declines when these items are found in a backpack with other bags of methamphetamine. Finally, we find no prejudice in counsel's failure to question Gutierrez about his "single purpose" testimony. Jurors would undoubtedly be aware that ziplock bags have many uses that are not criminal. Thus, we find it highly unlikely that cross-examination pointing this out would have altered the trial result.

4. Solicitation of Testimony From Officer Lim

Smith complains that her attorney elicited an improper opinion from Officer Lim about Smith's guilt.

No witness may express an opinion as to the defendant's guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). And testimony that infers no conclusion other than the defendant's guilt is not allowed. *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573 (1995). If the testimony, however, does not directly comment on the defendant's guilt or the veracity of a witness, is helpful to the jury, and is based on inferences from the evidence, it is not improper opinion testimony. *Heatley*, 70 Wn. App. at 578. Whether testimony amounts to an improper opinion on guilt depends upon the type of witness, the nature of the charges, the type of defense, and the other evidence. *State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d

960 (2002) (citing *Heatley*, 70 Wn. App. at 579).

Defense counsel's questioning of Officer Lim was not deficient. Counsel had the following exchange with Lim:

> Q: But no prints were requested, either by you or your partner, Officer Gutierrez; is that correct?
> A: No, because of some additional -- or some additional evidence that we found inside the backpack.
> Q: And that was her ID?
> A: Her identification card, her -- I believe her bank debit card, and her social security card, all in her name.
> Q: And from when that was found, as far as you're concerned, you had probable cause to arrest her for possession of drugs and a gun, and that was what you did. You booked her for what you had probable cause to --
> A: Yes, based on that evidence and based on our observations of her actually holding the backpack on our arrival.
> Q: Okay. And the fact that she was claiming that this other person, Windy, had actually given her the backpack, that that was not of any consequence to you. You had enough to make an arrest at that point in time; is that right?
> A: Yes. She made that -- made those statements after she was advised that she was placed under arrest.
> Q: And did you or your partner or anybody from your department, as far as you know, actually go out and try to find Windy and talk to Windy?
> A: As far as I could recall, she had no information on Windy, other than her first name.
> Q: And she claimed to have no knowledge of the drugs that you found, or your partner found, and the bag or the gun that was found in the bag?
> A: That's what she stated to us.
> Q: But you didn't believe her because her ID was in the bag, right?
> A: Yes, that and plus she was actually holding the bag.

RP 159-60.

Officer Lim's statement does not constitute improper opinion testimony. First, Lim's statement was not a direct comment on Smith's guilt. The questioning concerned evidence sufficient for probable cause to arrest Smith, not evidence sufficient to convict her beyond a reasonable doubt.

Next, counsel was making the important point that the officers did not look for additional evidence or try to locate and talk to "Windy" because they thought the evidence they possessed was sufficient. Accordingly, the officers rejected Smith's theft story without investigating it. And they also neglected to look for fingerprint evidence on the drugs or the gun. Thus, counsel's point was that the officers stopped short of a full investigation because they "did not believe" Smith. Counsel elicited the "did not believe" evidence to show the officers' inadequate investigation, not that his client was guilty. Far from deficient representation, counsel was exploiting a weakness in the State's case. We reject Smith's claim that her counsel was ineffective in the cross-examination.

5. Interview of Witnesses and Trial Preparation

Smith contends that her counsel inadequately prepared for trial. Specifically, she argues that counsel did not interview defense witness Windy Ware until after his opening statement, which led to prejudicial contradictions between the opening statement and Ware's testimony.

The presumption of effective counsel can be overcome by showing that counsel failed to fully investigate and prepare for trial. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (citing *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). Failure to interview witnesses may support a claim of ineffective assistance of counsel. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) (citing *State v. Visitacion*, 55 Wn. App. 166, 173-74, 776 P.2d 986 (1989)).

Smith's argument misconstrues the record. During pretrial motions on January 18, 2005, counsel stated he had already interviewed Ware; defense counsel made his opening statement on January 19, 2005. Counsel also talked to Ware briefly before she took the stand during trial on January 19. Although these interviews were

brief, they distinguish the case from *Jury*, where the court found counsel's performance deficient because he had made no investigation of the facts and admitted that he was unprepared for trial. *Jury*, 19 Wn. App. at 264.

Smith also fails to show contradictions between her counsel's opening statement and Ware's testimony. In his opening statement, defense counsel stated that "Windy goes out and finds out who's got Amber's ID, and she comes and delivers it in the form of a backpack." RP at 103. Ware later testified that she had no idea who had broken into Smith's apartment. Differences between a witness interview statement and trial testimony, however, do not automatically constitute ineffective assistance of counsel. *See In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 754-55, 16 P.3d 1 (2001) (finding no ineffective assistance of counsel where previously interviewed witness surprised defense with damaging testimony on the stand, contradicting earlier statements). Not only did defense counsel interview Ware prior to his opening statement, he briefly interviewed her again immediately before her testimony "to verify that she's still going to say what she's told me the other day and what I told you she's going to testify to." RP at 169. Thus, Smith has again not met her burden of showing deficient representation.

6. Solicitation of Felony Status and Lesbian Relationship

Smith argues that her counsel violated ER 609(a) by eliciting Windy Ware's prior felony conviction during direct examination. She also alleges that the defense counsel's reference to Ware and Smith's lesbian relationship was irrelevant and potentially prejudicial.

ER 609 allows a party to impeach a witness with evidence of a felony conviction. *State v. Gentry*, 125 Wn.2d 570, 637, 888 P.2d 1105 (1995). Using convictions to show bias or prejudice does not fall under ER 609. *See State v.*

Gerard, 36 Wn. App. 7, 11, 671 P.2d 286 (1983). If a prior conviction is admissible under ER 404(b) to show knowledge, motive, identity, common scheme, or other substantive elements of a crime, ER 609 is inapplicable. 5A K. Tegland, Wash. Prac. § 609.2, at 393 (4th ed. 1999) (citing *Roshan v. Fard*, 705 F.2d 102 (4th Cir. 1983)).

Smith fails to overcome the presumption that counsel was effective because evidence of Windy Ware's prior conviction likely comes within ER 404(b) and was not prejudicial. The defense theory of the case relied on Ware's ownership of the drugs and gun but Ware testified that neither the gun nor the backpack belonged to her. Establishing that Ware had a felony and could not possess a gun conceivably showed Ware's motive for getting rid of the gun by giving it to Smith, as well as her motive to lie when she said she "didn't know anything about a gun at that point." RP at 179.

Smith's argument that defense counsel improperly brought out her lesbian relationship with Ware also does not overcome the presumption that counsel was effective. Eliciting Ware's relationship with Smith was arguably a legitimate tactic to show Ware's motive for giving Smith the backpack. As counsel stated during his closing statement, "Windy comes back and drops this stuff off. Windy wanted a relationship and Amber didn't." RP at 222. Moreover, Smith cites no specific prejudice, nor does she cite case law for her argument. She states that "[a]lthough the legal relationship between the defendant and Windy Ware *should not have affected the factfinder* . . . the relationship was irrelevant to the issues in trial." Br. of Appellant at 36 (emphasis added). Absent some reason to believe otherwise, we agree that Smith and Ware's lesbian relationship was unlikely to have influenced the jury's decision as to whether Smith possessed drugs. Without resulting prejudice, counsel's performance cannot constitute ineffective assistance of counsel.

Lord, 117 Wn.2d at 884.

7. Decision to Call Witnesses

Smith argues that her counsel should have called the officer who took the burglary police report as a witness to corroborate the defendant's testimony regarding the burglary.

Generally, a decision whether to call a particular witness is a tactical one that will not support a claim that counsel was ineffective. *State v. Warnick*, 121 Wn. App. 737, 746, 90 P.3d 1105 (2004) (citing *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987)). The trial attorney is in a far better position than a reviewing court to determine whether a witness will help the defendant's case. *See Robinson*, 79 Wn. App. at 396 (citing *Piche*, 71 Wn.2d at 590-91). The failure to call a witness will support a claim of ineffective assistance of counsel only if it was unreasonable and either resulted in prejudice or created a reasonable probability that, had the lawyer presented the witness, the trial outcome would have been different. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Smith fails to overcome the strong presumption of effective assistance of counsel. The record does not explain why defense counsel chose not to call the officer who took the police report as a witness. Thus, we do not know whether counsel interviewed the witness and found some tactical disadvantage in calling him to testify. Moreover, even if we assume that counsel should have called the officer, Smith cannot show prejudice by his absence. Smith testified to the burglary and Daryl Salhus, Smith's neighbor who reported the current incident, corroborated that a burglary had occurred. Consequently, Smith is unable to show that the trial result would have been different if the officer who took the burglary report had testified.

II. Cumulative Error Doctrine

Smith argues that several trial errors combined to deny her a fair trial and that the

cumulative error doctrine warrants reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors of counsel cumulatively result in a trial that is fundamentally unfair. *State v. Price*, 126 Wn. App. 617, 655, 109 P.3d 27 (2005) (citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)), *review denied*, 155 Wn.2d 1018 (2005). The defendant has the burden of showing an accumulation of error of sufficient magnitude such that retrial is necessary. *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

Although Smith claims that her counsel failed her in several instances, we have rejected her claims. Thus, the cumulative error doctrine does not apply. *See Price*, 126 Wn. App. at 655.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Houghton, P.J.

Penoyar, J.